

**MEDIUM
PRIORITY**

**BETWEEN BRUCE ARTHUR MACLEAN,
BRUCE RAYMOND SHEPPARD
AS TRUSTEES OF ALBANY FARMS
TRUST**

First Appellant

A N D BRUCE ARTHUR MACLEAN

Second Appellant

**A N D PAUL ANDREW STEWART
TRADING AS ANDREWS
CONTRACTING**

Respondents

Coram: Henry J
Thomas J
Elias J

Hearing: 19 August 1997

Counsel: L Herzog for First and Second Appellants
J B Samuel for Respondents

Judgment: 20 August 1997

ORAL JUDGMENT OF THE COURT DELIVERED BY THOMAS J

Introduction

The present appeal relates to litigation which provides a prime example of the misuse of the summary judgment procedure. The litigation relates to a building dispute. It is strongly contested by the parties. As tempting as the summary judgment procedure may have appeared to the plaintiffs, the respondents in this Court, the procedure should have been resisted, or discontinued when it became plain that it was

inappropriate. In the result, much time has been lost, much effort needlessly expended, and the parties put to considerable legal costs, all for no apparent or constructive purpose.

Rule 136 of the High Court Rules is plain in its terms. The plaintiff must satisfy the Court the defendant has no defence to a claim. Only then can the Court give summary judgment against a defendant.

The background

By an agreement dated 18 January 1994, the respondents agreed to construct a dwellinghouse for the appellants for a contract price of \$368,618, exclusive of GST. Work commenced. From about June of that year disputes arose between the parties relating to the quality of the workmanship. The appellants withheld monies due under the contract. Although the disputes had not been resolved, the appellants took possession of the house on 18 November 1994. In February of the following year attempts were made to refer the matters in dispute to arbitration, but progress was desultory.

On 18 September 1995 the respondents filed an application for summary judgment. The application was met with an application by the appellants for a stay of proceedings pursuant to s 5 of the Arbitration Act 1908. The District Court Judge who heard the applications formed the preliminary view that a dispute existed which should be referred to arbitration. He therefore granted the appellants' application for a stay, but reserved the right for the respondents to pursue summary judgment for the amount not in dispute. In the result, the respondents proceeded with their application for summary judgment for an amount alleged to be due under the contract and not contested.

The application was heard before His Honour, Judge Lance, in the District Court on 25 March 1996. The learned Judge entered summary judgment for the respondents in the sum of \$98,877.42, together with costs of \$9,000. The appellants appealed to

the High Court against this decision. Salmon J heard the appeal on 19 September 1996. On 1 October he delivered a judgment substantially dismissing the appeal but reducing the judgment sum to \$87,303.68. The Judge also reduced the costs in the District Court to \$6,000 and awarded costs in the High Court in the sum of \$3,000.

Mr Herzog, appearing for the appellants, applied for leave to appeal against Salmon J's decision. The application was heard by Hansen J on 22 October 1996, and he granted the appellants leave to appeal. Although our initial reaction was that leave to appeal in a matter of this kind, which had been heard and dealt with in the District Court and then subject to an appeal in the High Court, was unwarranted, there can be no doubt that Hansen J's decision to permit the matter to be pursued in this Court was correct.

The appeal is allowed

In our view the appeal must be allowed.

The respondents supported their case for summary judgment with the evidence of the respondents and that of an independent expert. The appellants responded with the evidence of their own independent expert. Having examined the alleged defects he expressed the opinion that the cost of the remedial work involved would exceed the sum claimed by the respondents by \$3,162.75. Salmon J rejected his evidence. He said:

I am, of course, conscious of the need in determining whether the respondents are entitled to summary judgment for all or part of their claim, to bear in mind that the onus of establishing that the appellant has no defence to the claim is on the respondent. However, this is one of those cases where in my view the circumstances cause the evidential onus to shift to the appellants and require them to demonstrate a tenable defence. This is a case where it was possible for the appellants to produce in these proceedings expert evidence which would have verified their claims. It was reasonable to expect them to do so. In my view the affidavits filed on behalf of the appellants fail to establish that there is a credible dispute as to amounts claimed by the respondent. The only affidavits which could possibly do this are those of Mr Templeman. However, those affidavits do not address the causes of the alleged defects nor do they provide any justification for the amounts claimed on the appellant's behalf.

In the absence of a proper evidential foundation for the allegations of the appellant this Court should take the approach suggested by the Court of Appeal in *AGC NZ Ltd v McBeth* and accept the plaintiff's verification, unless it is patently wrong. Mr Dean, in his two affidavits, and particularly in that which was sworn on 22 March this year, has taken what I consider to be a properly conservative approach to the question of items which may arguably be in dispute....

The learned Judge accepted the evidence of the respondents' expert but deducted certain further sums which he considered were in dispute.

We do not doubt that Salmon J examined the strength and merits of the respondents' claim most carefully. Judge Lance did the same. We do not consider, however, that it was appropriate for either Judge to enter upon such a detailed inquiry. Indeed, Mr Samuel, appearing for the respondents, also invited this Court to examine the respondents' claim item by item. Although we heard argument at some length on this basis we reiterate that such an exercise is inappropriate in the context of a summary judgment application. Indeed, as argument progressed before us it became increasingly clear that the issues could not properly be resolved summarily. Consequently, we are left with the impression that the learned Judge in the Court below was drawn into the merits of the claim and sought to resolve the competing issues between the parties when his sole task was to decide whether he was satisfied the appellants had no defence.

Nor do we consider that the learned Judge was entitled to reject the evidence of the appellants' expert out of hand. We acknowledge, of course, that a denial of liability in general terms is of itself unacceptable. The defendant cannot escape liability for summary judgment by raising a false, hypothetical or frivolous "defence" and then contend that the Court cannot be satisfied that he or she has no defence. But in this case the expert's affidavits disclose considerable disquiet about the quality of the respondents' workmanship, and his assessment of the cost of remedying the "current defects" was duly itemised. If his assessment is correct the appellants do not owe the respondents any money at all. This is not a case where the appellants are claiming a set-off only. They are alleging that, because of faulty workmanship, no money at all is

owing. Thus, it cannot be said that there is an undisputed sum. Whether or not this is correct properly can be resolved only after a hearing. The appellants' evidence will then be expanded and can be tested in cross-examination. In the meantime it is premature to seek to reach a firm conclusion as to its validity.

It is apparent that Salmon J was led into the merits and the task of resolving the competing claims by his view of the onus of proof. It will be recollected that the learned Judge said this was one of those cases where the circumstances caused the evidential onus to shift to the appellants and required them to demonstrate a tenable defence. It was a case, he said, where it was possible for the appellants to produce expert evidence which would have verified their claims.

There is no question but that on a summary judgment application the onus is on the plaintiff to satisfy the Court that the defendant has no defence. That onus does not shift. It may well be that the evidence adduced by the plaintiff in support of the application would, in the absence of any response by the defendant, satisfy the Court that the defendant had no defence. The Court may then enter judgment for the plaintiff. But the defendant may, of course, adduce evidence directed to showing that he or she does have a defence. The question which the Court must then answer having regard to the further evidence remains the same; is it satisfied the defendant has no defence.

In the present case it would undoubtedly have been open to the Court to be satisfied that the appellants had no defence to the allegedly undisputed sum owing under the contract on the basis of the respondents' evidence. But this evidence was met with the affidavits of the appellants' expert. The appellants undertook no onus in presenting this evidence. The evidence which they adduced, however, made it difficult in our view for the Court to be satisfied that there is not a genuine dispute between the parties and that the appellants have no defence. Clearly they have. Whether it is well-founded or not must await a full hearing in the arbitration proceeding which is contemplated.

Finally, we feel uncomfortable with the observation of the learned Judge to the effect that, should the appellants in fact have a genuine claim in relation to the matters they have raised, it seemed to him they could bring the claim by way of counterclaim in the arbitration proceedings. This statement would appear to suggest that, notwithstanding the judgment entered for the respondents, it would remain open for the appellants to pursue the matters which they had canvassed in the summary judgment proceeding in the arbitration. Thus, the Judge may well have been influenced in his decision by the thought that the appellants were not being finally debarred from pursuing their claim. It was conceded by Mr Samuel, however, that this could not be the case. The doctrines of *res judicata* or issue estoppel would apply to preclude the appellants from pursuing any claim they do not owe the monies included in the summary judgment on the basis that the respondents' workmanship is faulty or in respect of the defects in the building. Only items not covered by the summary judgment could be pursued by the appellants in the arbitration proceeding.

For the above reasons we allow the appeal.

The costs fixed in the District Court and in the High Court below are vacated. Costs are awarded to the successful appellant in this appeal in the sum of \$3,500, together with such disbursements and travelling expenses as may be agreed, or if not agreed, as may be approved by the Registrar.

Thomas J

Counsel:

Jeremy Dillon, Orewa, for First and Second Appellants
Jennifer G Connell, Auckland for Respondent